(1)

Supreme Court, U.S.
FILED

No. 00-894 DEC - 1 2000

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

HOMER T. MCKINNEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Wm. J. Sheppard, Esquire
COUNSEL OF RECORD
D. Gray Thomas, Esquire
Sheppard, White and Thomas, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661
COUNSEL FOR PETITIONERS

November 29, 2000

32pp

QUESTION PRESENTED FOR REVIEW

The question presented by this Petition is:

Whether the Firearms Owners Protection Act of 1986 materially altered the Government's burden of proving a profit motive in prosecutions for unlicensed dealing in firearms.

LIST OF PARTIES TO THE PROCEEDING

The Petitioner and the United States were parties in the Court of Appeals. Walter Golden and Gerald Faulkner, Mr. McKinney's co-defendants in the district court, also were parties in the Court of Appeals.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW ..... *i*

LIST OF PARTIES TO THE PROCEEDING ..... *ii*

TABLE OF CONTENTS ..... *iii*

TABLE OF AUTHORITIES ..... *iv*

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS WHY THE WRIT SHOULD BE GRANTED 5

CONCLUSION 10

TABLE OF AUTHORITIES

Case(s) **Page**

Bryan v. United States,
524 U.S. ___, 118 S.Ct. ___,
141 L.Ed.2d 197 (1998) 8

United States v. Beecham,
1993 W.L. 188295 (4th Cir. June 2, 1993) 8

United States v. Breier,
813 F.2d 212 (9th Cir. 1987) 7

United States v. Gross,
451 U.S. F.2d 1355 (2nd Cir. 1971) 6

United States v. Jackson,
352 F.Supp. 672 (S.D. Ohio 1972) 6

United States v. Masters,
622 F.2d 83 (4th Cir. 1980) 8

United States v. Schumann,
862 F.2d 1234 (11th Cir. 1988) 7

United States v. Swinton,
521 F.2d 1255 (10th Cir. 1975) 5

United States v. Williams,
502 F.2d 581 (8th Cir. 1974) 5

United States v. Wilmoth,
630 F.2d 123 (5th Cir. 1981) 6,8

TABLE OF AUTHORITIES

Statutes **Page**

18 U.S.C. §371 2

18 U.S.C. §921(a)(22) 2,3,4

18 U.S.C. §922(a)(1)(A) 2

18 U.S.C. §3231 2

28 U.S.C. §1254(1) 2

Other Authorities

Committee on Pattern Jury Instructions, District Judges Association, Eleventh Circuit, *Pattern Jury Instructions (Criminal Cases)* (West 1985 ed.) 4

Committee on Pattern Jury Instructions, District Judges Association, Eleventh Circuit, *Pattern Jury Instructions (Criminal Cases)* (West 1997 ed.) 3-4

Hardy, David T., *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb.L.Rev. 585 (1987) 8

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HOMER T. MCKINNEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on July 19, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals appears at App. 1a through 6a of this Petition and is unpublished.

JURISDICTION

The Court of Appeals entered judgment on July 19, 2000. A timely petition for rehearing and rehearing *en banc* was denied on September 20, 2000. A copy of the unpublished order denying rehearing and rehearing *en banc* appears at App. 7a-8a to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

This case requires interpretation and application of 18 U.S.C. §921(a)(22), which provides, in pertinent part:

> The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection....

STATEMENT OF THE CASE

The Petitioner was charged in the United States District Court for the Middle District of Florida with unlicensed dealing in firearms, in violation of 18 U.S.C. §922(a)(1)(A), and with conspiracy to do so in violation of 18 U.S.C. §371. The district court had jurisdiction pursuant to 18 U.S.C. §3231. After a jury trial, the defendants were convicted and sentenced to terms of 30 months imprisonment each. *See* App. 2a.

At trial, the critical matter disputed was whether the Petitioner's sale of firearms was done unlawfully, with the

principal objective of livelihood and profit, or lawfully, principally in pursuit of a hobby or collection, after he had voluntarily returned his firearms dealer's license to the Government. The United States contended that the evidence reflected practices of repetitive firearms sales at gun shows, indicative of a profit motive. Mr. McKinney presented evidence, including his own testimony, that he bought and sold guns with no profit motive, but rather because he was a firearms afficionado who participated in gun shows to keep himself occupied after his wife's death.

The evidence at trial reflected that the Petitioner received gross revenues from firearms sales of $7,550.00 during the relevant period of time. He expended $7,621.44 for 17 of the 25 firearms he purchased during that period, and spent approximately $935.00 to rent tables at gun shows. The evidence also indicated that he had engaged in some firearms trades with no exchange of money.

Both the Petitioner and the United States requested the district court to instruct the jury in accordance with the 1997 Eleventh Circuit Pattern Jury Instructions, which reflect standards applicable to such a case under the Gun Control Act, as amended by the Firearms Owners Protection Act of 1986. The jury instruction jointly requested, in pertinent part, precisely tracks the definitional statute, 18 U.S.C. §921(a)(22), as follows:

> The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.

Committee on Pattern Jury Instructions, District Judges Association, Eleventh Circuit, *Pattern Jury Instructions*

(Criminal Cases), Offense Instructions 30.1 (West 1997 ed.) (App. 13a-14a); *see also*, 18 U.S.C. §921(a)(22). However, the district court instead utilized the unlicensed firearms dealing instruction contained within the 1985 Eleventh Circuit Pattern Jury Instructions, which predated the amendments to the Gun Control Act made by the Firearms Owners Protection Act. In conformance with the 1985 pattern instructions, the district court instructed the jury with the statutory definition, but then followed with the elaboration:

> It is not necessary for the Government to prove, however, that buying and selling firearms was the Defendant's primary source of income, or that he made any specific number of sales, or that he actually earned a profit.

App. 3a-4a; *see also*, Committee on Pattern Jury Instructions, District Judges Association, Eleventh Circuit, *Pattern Jury Instructions (Criminal Cases)*, Offense Instructions 20 (West 1985 ed.) (App. 11a-12a). The Petitioner contended below that this additional instruction effectively stripped him of his defense, contrary to both the statutory language and intent of Congress to narrow certain applications of the Gun Control Act by passage of the Firearms Owners Protection Act of 1986. He timely but unsuccessfully objected to the instruction as given, moved for judgment of acquittal for insufficiency of the evidence and moved for a new trial.

The Court of Appeals affirmed. In its decision, the Court of Appeals relied on decisions interpreting the pertinent statute prior to enactment of the Firearms Owners Protection Act. *See* App. 5a. This petition follows.

REASONS FOR GRANTING THE WRIT

The Court should grant review because the issue is important and arises in large numbers of firearms dealing cases throughout the United States; this Court has not previously decided the issue directly; and the decision of the Court of Appeals contravenes both the specific language of the statute involved and the clearly expressed intent of Congress in the Firearms Owners Protection Act of 1986, recognized in other decisions of courts of appeals. The Court of Appeals failed to consider or even mention the effect of the Firearms Owners Protection Act; relied upon judicially created standards of proof explicitly overruled by the Act; and ignored its own 1997 amendments to pattern jury instructions made in recognition of the effect of the Act.

A. The Firearms Owners Protection Act of 1986 Narrowed the Conduct Prohibited by the Gun Control Act.

Prosecutions of collectors or hobbyists who had disposed of small numbers of firearms motivated Congress in 1986 to amend the Gun Control Act of 1968. *See* 131 Cong. Rec. S9101-02 (Daily ed. July 9, 1985); 132 Cong. Rec. H1651-52 (Daily ed. April 9, 1986) (Statement of Rep. Volkmer). One of the major purposes of the Firearms Owners Protection Act of 1986 was to substantially narrow the scope of conduct criminalized under judicial interpretations of the Gun Control Act. S. Rep. No. 476, 97th Cong. 2nd Sess. 17-18 (1982), *citing United States v. Williams*, 502 F.2d 581 (8th Cir. 1974) and *United States v. Swinton*, 521 F.2d 1255 (10th Cir. 1975); S. Rep. No. 583, 98th Cong. 2nd Sess. 8 (1984). Under the 1986 Act, the Government, to establish the element of engaging in the business of dealing in firearms, must prove that the defendant devoted time, attention and labor to dealing firearms as a regular course of trade or business with the principal objective of livelihood *and* profit through the repetitive purchase and

resale of firearms. *See* Pub. L. No. 99-308, Sec. 101(6), 100 Stat. 449, 450 (1986). Sales and exchanges for advancement of a hobby are expressly excepted from criminal prohibitions under the Firearms Owners Protection Act.

Prior to the 1986 amendments, the Gun Control Act required a dealer engaged in the business of selling firearms to be licensed, without further explicit statutory definition. *See* Pub. L. No. 90-618, Sec. 102, 82 Stat. 1213, 1216-17 (1968). The majority of circuits interpreting the Gun Control Act followed the test of *United States v. Gross*, 451 F.2d 1355, 1357 (2nd Cir. 1971), which held that "dealer" means anyone engaged in the business of selling firearms, and that "business" is that which occupies time, attention and labor for the purpose of livelihood *or* profit. Other circuits followed the test enunciated in *United States v. Jackson*, 352 F.Supp. 672, 674 (S.D. Ohio 1972), *aff'd. without opinion*, 480 F.2d 927 (6th Cir. 1973), which held persons to be dealers "if they have guns on hand or are ready and able to procure them...for the purpose of selling...." Both standards criminalized a wide variety of conduct.

The *Jackson* test was adopted in *United States v. Wilmoth*, 630 F.2d 123 (5th Cir. 1981), and *Wilmoth* was followed by the district court in this case.[1] *Wilmoth* interpreted the Gun Control Act of 1968 as follows:

> The statute is aimed broadly at those who hold themselves out as a source of firearms. It is enough to prove that the accused has guns on hand or is ready and able to procure them for the purpose of selling them from

---

[1] Decisions of the former Fifth Circuit rendered prior to October 1, 1981 are binding law in the Eleventh Circuit unless subsequently overruled or superseded. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1980) *(en banc)*.

> time to time to such persons as might be accepted as customers.

636 F.2d at 125. This is precisely the type of broad statutory interpretation that Congress overruled through the Firearms Owners Protection Act.

Certain circuits have recognized the limiting effect of the Firearms Owners Protection Act. For example, the court in *United States v. Breier*, 813 F.2d 212 (9th Cir. 1987), noted that

> The legislative history of the 1986 Act shows that Congress was well aware of the judicial interpretations of the term "engaged in the business." It enacted new subsections 921(a)(21) and 921(a)(22) in order to limit the conduct deemed to be criminal. This, to repeat, repealed a "liability."

Id. at 216 (footnote omitted), *citing*, 131 Cong. Rec. S9127 (Daily ed. July 9, 1985); 131 Cong. Rec. S8689 (Daily ed. June 24, 1985) (statement of Senator Hatch). Likewise, the court in *United States v. Schumann*, 861 F.2d 1234, 1237 (11th Cir. 1988), noted that the 1986 Act provided "a narrower definition of 'dealer'" by refining the definition of "engaged in the business." The *Schumann* court specifically contrasted the narrower standard of liability under the 1986 Act with prior judicial interpretations providing a broad scope of liability under the Gun Control Act. *Id.* at 1236 n.2 In both *Breier* and *Schumann*, the courts were faced with determination of whether the 1986 Act should be given retroactive effect for defendants arguably entitled to acquittal under the 1986 definition, while guilty under preexisting standards. *See Breier*, 813 F.2d at 213 ("the 1986 Act was considered by Breier to be more favorable to his position than was the law under which he was tried and convicted."); *Schumann*, 861 F.2d at 1238 ("the new definition of 'engaged in the business' would absolve Schumann of liability in the forfeiture action if, as he

claimed, he was merely closing out his gun business and liquidating his inventory.").

This Court as well has acknowledged that the purpose and effect of the 1986 Act was to eliminate essentially strict liability that had been imposed previously by more precisely defining "engaged in the business." *Bryan v. United States,* 524 U.S. ___, ___ 118 S.Ct. ___, ___, 141 L.Ed.2d 197, 202-03 (1998). Among the "imaginative interpretations" of the definition overruled by the 1986 amendments were those resulting in liability of a collector who sells firearms in order to buy others, even though receipt of a monetary price is involved. *See* Hardy, David T., *The Firearms Owners' Protection Act: A Historical and Legal Perspective,* 17 Cumb. L. Rev. 585, 630 n. 244 (1987); H.Rep. No. 495, 99th Cong., 2nd Sess. 10 (1986). The mere exchange of money in buying and selling firearms, as occurred in this case, is insufficient to establish a motive of "livelihood and profit" under the Firearms Owners Protection Act.

The Court of Appeals relied upon judicial decisions that formulated legal standards since overruled by the 1986 Act. The court below relied on *United States v. Beecham,* 1993 W.L. 188295, *3 (4th Cir. June 2, 1993) (unpublished), which decision in turn relied exclusively on the pre-1986 decisions in *United States v. Masters,* 622 F.2d 83, 88 (4th Cir. 1980) and *United States v. Wilmoth,* 630 F.2d 123, 125 (5th Cir. 1981), and the court then adopted and applied the extremely broad standards of *Wilmoth.* App. 5a-6a. The court failed to acknowledge the narrower standards applicable under the 1986 act, and so erred as a matter of law.

B. The Error Prejudiced the Petitioner.

The issue is critical to the disposition of this case. Under the evidence presented at trial by the Government, the Petitioner's gross revenue from firearms sales after he

returned his dealer's license totaled $7,550.00, and also indicated he had traded some firearms for others with no exchange of money. The Government's evidence reflected that the Petitioner purchased 25 guns after turning in his license, and the 17 firearms he purchased for which purchase prices were documented cost the Petitioner $7,621.44. He also expended approximately $935.00 in additional money to rent tables at gun shows that he attended. This is precisely the type of activity that the Firearms Owners Protection Act was intended to protect from prosecution. The verdict is not supported by the facts when viewed in the light of the Firearms Owners Protection Act.

The Court of Appeals has directly thwarted the congressional intent of the Firearms Owners Protection Act as expressed in both the clear statutory language and the legislative history. The resolution of the issue by the Court of Appeals is inconsistent with statutory language and intent and with this Court's and courts of appeals' observations of the standard of proof affected by the 1986 Act. The issue presented is an important question of federal law that has not been, but should be, directly settled by this Court. Accordingly, the Court should grant review in this case.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Wm. J. Sheppard, Esquire
Counsel of Record
D. Gray Thomas, Esquire
Sheppard, White and Thomas, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661

Counsel for Petitioner

Date: November 29, 2000

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HOMER T. MCKINNEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Wm. J. Sheppard, Esquire
COUNSEL OF RECORD
D. Gray Thomas, Esquire
Sheppard, White and Thomas, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661
COUNSEL FOR PETITIONERS

November 29, 2000

TABLE OF CONTENTS

Page

Opinion of the Eleventh Circuit Court of Appeals dated July 19, 2000 ..... 1a

Order of the Eleventh Circuit Court of Appeals, Denying Motion for Rehearing and Rehearing *En Banc* 7a

District Court's Jury Instruction 9a

Eleventh Circuit Pattern Jury Instructions (1985) Offense Instructions 20 ..... 11a

Eleventh Circuit Pattern Jury Instructions (1997) Offense Instructions 30.1 ..... 13a

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
JUL 19 2000
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11202
Non-Argument Calendar

D.C. Docket No. 97-00214-CR-J-10B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALTER D. GOLDEN,
GERALD ROY FAULKNER,
HOMER McKINNEY

Defendants-Appellants.

Appeals from the United States District Court for
the Middle District of Florida

(July 19, 2000)

Before ANDERSON, Chief Judge, TJOFLAT and
DUBINA, Circuit Judges

PER CURIAM:

Walter D. Golden, Gerald Roy Faulkner, and Homer T. McKinney were convicted by a jury as follows: all three were convicted of conspiracy to deal in firearms without a license, in violation of 18 U.S.C. § 371 (1994); in addition, Golden and McKinney were convicted on four counts and Faulkner was convicted on six counts of dealing in firearms without a license, in violation of 18 U. S.C. §§ 922(a)(1)(A) (1994), 924(a)(1)(D) (1994). All three defendants were given concurrent prison sentences of thirty months. They now appeal.

Each appellant contends that the evidence was insufficient to establish the charged conspiracy offense, and that he was engaged in the business of dealing in firearms. Their contentions are meritless. The evidence before the jury was that appellants had engaged in repetitive sales of firearms to ATF agents, that numerous firearms with price tags had been seized from appellants' residences, that receipts and other records showed repetitive purchases and sales of firearms, and that appellants had made several inculpatory statements. The jury also heard from appellants, but chose not to believe them.

Appellants contend that the district court's jury instruction on the elements of the offense of dealing in firearms without a license amounted to an abuse of discretion. The abuse purportedly occurred in connection with the court's definition of the phrase "with the principal objective of livelihood and profit." We are not persuaded.

Regarding this point, the court instructed the jury as follows:

> A person is "engaged in the business of selling fire arms at wholesale or retail," if that person devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms. Such term does not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of that person's personal collection of firearms.
>
> The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection. It is not necessary for the Government to prove, however, that buying and selling firearms was the Defendant's primary

> source of income, or that he made any specific number of sales, or that he actually earned a profit.

The terms appearing in Chapter 44, "Firearms," of Title 18 are defined in 18 U.S. C. § 921. The first paragraph of the court's instruction quoted above mirrors the definition set forth in section 921 (a)(21)(C). The second paragraph mirrors the relevant part of the definition for "the principal objective of livelihood and profit" set forth in section 921(a)(22): "The term 'with the principal objective of livelihood and profit' means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection."

Appellants' objection to the court's charge concerns the last sentence of the second paragraph: "It is not necessary ... that he actually earned a profit." Appellants contend that this sentence effectively stripped them of their defense; that is, although they had bought and sold firearms, they had not done so with the predominant intent of obtaining a livelihood and pecuniary gain, as opposed to "other intents" not prohibited by statute.

The Government's response to this, which we believe is correct, is that proof that the defendant bought and sold firearms, that buying and selling firearms was his primary source of 'income, and that he made a profit is unnecessary to establish the offense at issue. See, e.g., United States v. Beecham, Nos. 92-5147, 92-5399, 1993 WL 188295, at *3 (4th Cir. June 2, 1993) (unpublished) (citing United States v. Masters, 622 F.2d 83, 88 (4th Cir. 1980). What

> "[t]he government must show [is] a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist." United States v. Huffman, 518 F.2d 80, 81 (4th Cir.), cert. denied, 423 U.S. 864 (1975). It is sufficient that the evidence supports an inference that dealing in firearms was a regular business to which the defendant devoted time and effort and from which he intended to obtain a profit.

Id. As the court observed in United States v. Wilmoth, 636 F.2d 123, 125 (5th Cir. 1981):

> The statute is aimed broadly at those who hold themselves out as a source of firearms. It is enough to prove that the accused has guns on hand or is ready and able to procure them for the purpose of selling them from time to time to such persons as might be accepted as customers.

In this case, the Government proved that appellants had guns on hand or were ready and able to procure them - all for a profit. The evidence foreclosed the notion that they harbored some other permissible intent as they went about their business. Hence, if the challenged portion of the court's instruction was erroneous in a technical sense, the error was harmless. In sum, appellants' convictions are due to be affirmed.

Faulkner and McKinney ask us to vacate their sentences and remand their cases for resentencing on the ground that the court clearly erred in determining the number of firearms for which they should be held accountable. McKinney seeks the vacation of his sentences on an additional ground as well - that the court clearly erred in finding that he had failed to accept responsibility for his criminal conduct. We find no clear error in any of the court's findings; the evidence before the court was more than adequate to support its findings.

AFFIRMED.

FILED
U.S. COURT OF APPEALS
SEP 20 2000
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-11202-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALTER D. GOLDEN,
GERALD ROY FAULKNER,
HOMER MCKINNEY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F2d ____).

Before: ANDERSON, Chief Judge, TJOFLAT and DUBINA, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

DISTRICT COURT'S JURY INSTRUCTION

Title 18, United States Code, Section 922(a)(1)(A), makes it a Federal crime or offense to be in the business of dealing in firearms without a Federal license.

The defendant can be found guilty of that offense only if all of the following facts have been proved beyond a reasonable doubt:

First: That the Defendant engaged in the business of dealing in firearms;

Second: That the Defendant engaged in such business without a license issued under federal law; and

Third: That the Defendant did so willfully, that is that the Defendant acted with knowledge that his conduct was unlawful.

The term "firearm" means any weapon which is designed to, or may readily be converted to, expel a projectile by the action of any explosive; and the term includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer.

The term "dealer" means any person engaged in the business of selling firearms at wholesale or retail.

A person is "engaged in the business of selling firearms at wholesale or retail," if that person devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms. Such term does not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of that person's personal collection of firearms.

The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection. It is not necessary for the Government to prove, however, that buying and selling firearms was the Defendant's primary source of income, or that he made any specific number of sales, or that he actually earned a profit.

ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (1985)

OFFENSE INSTRUCTIONS

20

DEALING IN FIREARMS WITHOUT LICENSE

18 USC § 922(a)(1)

Title 18, United States Code, Section 922(a)(1), makes it a Federal crime or offense for anyone to engage in the business of dealing in firearms or ammunition with a Federal license; and Title 18 United States Code, Section 923, establishes a licensing procedure under which anyone desiring to engage in that business must apply for and obtain a Federal license to do so.

The Defendant can be found guilty of that offense only if all the following facts are proved beyond a reasonable doubt:

First: That the Defendant engaged in the business of dealing in firearms or ammunition as charge; and

Second: That the Defendant engaged in such business without a license issued under Federal law.

The term "firearm" means any weapon which is designed to, or may readily be converted to, expel a projectile by the action of an explosive; and the term includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer.

For a person to "engage in the business of dealing in firearms," as that phrased is used in these instructions, it is not necessary to prove that buying and selling firearms was the Defendant's primary source of income; nor must it be proved

that the Defendant has made any specific number of sales; *or* that he has made a specific dollar volume of sales; *or* that he has actually earned a profit.

What the Government must prove, beyond a reasonable doubt, is that the Defendant engaged in a greater degree of activity than the occasional sale of a hobbyist, and that he had guns on hand, or was ready and able to procure them, for the purpose of selling them from time to time to such persons as might be accepted as customers.

The essence of the offense is to engage in business as a firearms dealer without having the required Federal license, and the offense is complete when that occurs; it is not necessary to prove that the Defendant knew that the license was required.

ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (1997)

OFFENSE INSTRUCTIONS

30.1

DEALING IN FIREARMS WITHOUT LICENSE

18 USC § 922(a)(1)(A)

Title 18, United States Code, Section 922(a)(1)(A), makes it a Federal crime or offense to be in the business of dealing in firearms without a Federal license.

The Defendant can be found guilty of that offense only if all of the following facts have been proved beyond a reasonable doubt:

First: That the Defendant engaged in the business of dealing in firearms;

Second: That the Defendant engaged in such business without license issued under federal law; and

Third: That the Defendant did so willfully, that is that the Defendant acted with knowledge of the obligation to obtain a license, and intended to violate the law.

The term "firearm" means any weapon which is designed to, or may readily be converted to, expel a projectile by the action of an explosive; and the term includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer.

The term "dealer" means ay person engaged in the business of selling firearms at wholesale or retail.

A person is "engaged" in the business of selling firearms at wholesale or retail," if that person devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit

through the repetitive purchase and resale of firearms. Such terms does not include a person who makes occasional sales, exchanges or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of that person's personal collection of firearms.

The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.